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ONE HUNDRED SIXTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951

<http://www.house.gov/judiciary>

April 1, 2019

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The Honorable Joseph J. Simons
Chairman
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

The Honorable Bruce Hoffman
Director
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Dear Chairman Simons and Director Hoffman:

The Judiciary Committee oversees the enforcement of the federal antitrust laws, including by the Federal Trade Commission's Bureau of Competition. The Commission has been tasked by Congress to promote, develop, and protect antitrust law and competition policy.¹ We write to better understand how the Commission could use additional resources to serve this mission.

The United States is in the midst of a monopoly crisis. Mounting evidence suggests that market power has increased across the economy,² economic concentration has risen,³ and anticompetitive conduct is undermining the economic opportunity and well-being of working Americans.⁴ Taken together, these trends raise serious questions about the state of antitrust law

¹ *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625-26 (1935); see also Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C.L. Rev. 227 (1980) (detailing the legislative history of the FTC Act); Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L. J. 74, 88 (2003), <http://www.ftc.gov/sites/default/files/attachments/federal-trade-commission-history/origins.pdf>.

² JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES (2014); COUNCIL OF ECONOMIC ADVISERS, *Labor Market Monopsony: Trends, Consequences, and Policy Response*, (Oct. 2016) ("A variety of evidence points to a steady increase in product market concentration in the U.S. economy over the past few decades."), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf; Maureen Farrell, *2015 Becomes the Biggest M&A Year Ever*, THE WALL STREET JOURNAL (Dec. 3, 2015), <https://www.wsj.com/articles/2015-becomes-the-biggest-m-a-year-ever-1449187101>.

³ See John E. Kwoka, *U.S. Antitrust and Competition Policy amid the New Merger Wave* (July 2017), <http://cdn.equitablegrowth.org/wp-content/uploads/2017/07/25175704/072717-kwoka-antitrust-report.pdf> (2014).

⁴ *Diagnosing the Problem: Exploring the Effects of Consolidation and Anticompetitive Conduct in Health Care Markets: Hearing Before the Subcomm. on Antitrust of the H. Comm. On the Judiciary*, 116th Cong. (2019).

enforcement.⁵ As you have stated, concerns that our economy has grown more concentrated and less competitive “deserve serious attention.”⁶ Furthermore, it is equally vital that the Commission addresses concerns that it has been “too permissive in dealing with mergers and acquisitions, resulting in harm to consumer welfare via increased prices, limited consumer choice, and harm to workers,” as you have also noted.⁷

With these concerns in mind, we would like to learn how the Commission would use additional resources to confront and reverse this trend. As part of your response to these questions, please estimate the number of additional investigations and enforcement actions the Commission would likely be able to pursue with additional resources.⁸

1. What resources would the Commission need to significantly improve its enforcement activity with respect to anticompetitive conduct?
 - a. How would it allocate an additional \$50 million, \$75 million, or \$100 million in additional resources?
 - b. How much federal funding would the Commission require to investigate the unilateral conduct of an additional 10 firms each year?
 - c. How many economists and attorneys would the Commission require to investigate the unilateral conduct of an additional 10 firms each year?

⁵ See e.g., Barry C. Lynn, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION (2011); JONATHAN TEPPER, THE MYTH OF CAPITALISM: MONOPOLIES AND THE DEATH OF COMPETITION (2018); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018).

⁶ Joseph J. Simons, Chairman, Fed. Trade Comm’n, Opening Remarks at the First Hearing on Competition and Consumer Protection in the 21st Century 2-3 (Sept. 13, 2018), https://www.ftc.gov/system/files/documents/public_statements/1409925/opening_remarks_of_joe_simons_hearings1georgetown_sept2018_0.pdf

⁷ *Nominations Hearing Before the S. Comm. on Commerce, Science, & Transportation*, 115th Cong. 16 (2018) (response of Mr. Joe Simons, Chairman Designate, to question for the record), https://www.commerce.senate.gov/public/_cache/files/6c4149af-3023-4825-90f1-3c38e279fd0d/6A0CCF409AF89DC8D5C0A84CE8730012.confidential---simons---committee-questionnaire-redacted.pdf.

⁸ For instance, in the 1970s the FTC brought at least three predatory pricing cases, four monopolization cases, two “collective dominance” cases, and a conspiracy to monopolize case. See *In re ITT-Continental Baking Co.*, [1973-1976 Transfer Binder], Trade Reg. Rep. (CCH) Para. 20,784 (No. 9000, Dec. 10, 1974), complaint dismissed, 104 F.T.C. 280 (1984); *In re General Foods Corp.*, [1976-1979 Transfer Binder], Trade Reg. Rep. (CCH) Para. 21,173 (No. 9085, July 14, 1976), complaint dismissed, 103 F.T.C. 204 (1984); *In re Borden, Inc.*, D.8978 (July 2, 1974), finding liability, 92 F.T.C. 669, 808-09 (1978), *affirmed* sub nom. *Borden Inc. v. FTC*, 674 F. 2d 498 (6th Cir. 1982), *modified*, 102 F.T.C. 1147 (1982); *In re Xerox Corp.*, 86 F.T.C. 364 (1975) (consent decree); *In re Sunkist Growers*, D.9100 (May 1977), 97 F.T.C. 443 (1981) (consent decree); *In re General Motors Co.*, D. 9077 (May 22, 1976), complaint dismissed, 99 F.T.C. 464 (1982); *In re Reuben H. Donnelley Corp.*, D.9079 (Apr. 13, 1976), finding liability, 95 F.T.C. 1 (1980), enforcement denied sub nom. *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980); *In re Kellogg Co. et al*, 83 F.T.C. 1756 (1974); *In re Exxon et al*, 98 F.T.C. 453 (1981).

- d. Please describe instances in which insufficient resources hampered the Commission's ability to investigate anticompetitive conduct, or materially affected the outcome in a case investigating anticompetitive conduct.
2. What resources would the Commission require to significantly improve its ability to investigate and challenge anticompetitive mergers and acquisitions?
 - a. How would it allocate an additional \$50 million, \$75 million, or \$100 million in additional resources?
 - b. How much federal funding would the Commission require to investigate an additional 20 transactions every year?
 - c. How many economists and attorneys would the Commission require to investigate an additional 20 transactions every year?
 - d. Please describe instances in which insufficient resources hampered the Commission's merger enforcement efforts.
3. What resources would the Commission need in order to forcefully investigate and address anticompetitive practices in healthcare markets?
 - a. How would it allocate an additional \$50 million, \$75 million, or \$100 million in additional resources?
 - b. If given additional resources, what investigations or enforcement actions could the Commission pursue to tackle anticompetitive practices that raise drug prices?
 - c. If given additional resources, what investigations or enforcement actions could the Commission pursue to tackle the harms resulting from excessive hospital consolidation?
 - d. To what extent would additional resources enable the Commission to investigate and study the market for pharmaceutical benefits managers?
 - e. Please describe instances in which insufficient resources hampered the Commission's ability to tackle anticompetitive conduct and transactions in health care markets.

4. What resources does the Commission need in order to promote competition in digital markets, including through the Technology Task Force?
 - a. How would it allocate an additional \$50 million, \$75 million, or \$100 million in additional resources?
 - b. How much federal funding would the Commission require to investigate the conduct of 5 digital firms every year?
 - c. How many technologists, attorneys and economists would the Commission require to investigate an additional 5 transactions every year?
 - d. How does the Commission plan to maintain its efforts in other divisions within the Bureau of Competition after staff is relocated to the task force?
 - e. How much additional funding would the Commission need to create a Bureau of Technology?
 - f. How many technologists, attorneys, and economists would the Commission require to stand up a functioning Bureau of Technology?
 - g. Please describe instances in which insufficient resources hampered the Commission's ability to tackle anticompetitive conduct and transactions in digital markets.
5. What resources would the Commission need in order to adequately address anticompetitive practices and effects in labor markets, including through merger enforcement?
 - a. How would it allocate an additional \$50 million, \$75 million, or \$100 million in additional resources?
 - b. How much federal funding would the Commission require to initiate 10 investigations into anticompetitive practices in labor markets?
 - c. How many attorneys and economists would the Commission require to initiate 10 investigations into anticompetitive practices in labor markets?
 - d. How many labor economists would the Commission require to fully evaluate the impact of every transaction on labor markets?

- e. Please describe instances in which insufficient resources hampered the Commission's ability to evaluate anticompetitive effects in labor markets.

Thank you for your cooperation. We respectfully request that you provide a complete response to the questions listed above by no later than April 3, 2019.

Sincerely,

	
Jerrold Nadler	David N. Cicilline
Chairman	Chairman
House Committee on the Judiciary	House Subcommittee on Antitrust, Commercial and Administrative Law

cc: Doug Collins, Ranking Member, House Committee on the Judiciary

F. James Sensenbrenner, Ranking Member, House Subcommittee on Antitrust,
Commercial and Administrative Law

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The undersigned hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the County of [] State of []

James M. []
James M. []

Notary Public for the State of []